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AFFIN BANK BHD

v.

MAHANBIR SINGH MANMOHON SINGH & ANOR

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HIGH COURT MALAYA, JOHOR BAHRU
AZAHAR MOHAMED J
[ORIGINATING SUMMONS NO: 24-743-2006 (4)]
20 SEPTEMBER 2007

C ***LAND LAW:*** *Caveat - Private caveat - Application for removal by plaintiff bank chargee - Caveator is only shareholder of chargor company - Whether caveator has caveatable interest - National Land Code, s. 323, Form 19B*

D ***LAND LAW:*** *Caveat - Registrar's caveat - Application for removal by plaintiff bank chargee - No reply to plaintiff's averments - Whether application should be allowed on authority of Ng Hee Thoong & Anor v. Public Bank Berhad*

E This was an application by the plaintiff bank to remove a private caveat lodged by the first defendant and a registrar's caveat lodged by the second defendant against a piece of land ('the land') charged to the plaintiff. The plaintiff intended to enforce its charge over the land for an order for sale. The issue was whether the first defendant had a caveatable interest in the land as he was F not the registered owner of the land but a shareholder of the chargor company that was the registered owner of the land.

Held (allowing the plaintiff's application):

G **(1)** The test for the removal of a private caveat is a three-stage test: (i) the claim contained in the application made by the caveator in Form 19B under s. 323 of the National Land Code amounts in law to a caveatable interest; (ii) if the above is answered in the affirmative, then the caveator must show H that his claim to an interest in the land discloses a serious question meriting a trial; and (iii) in the event that the caveator manages to cross the hurdle above, then he must show that on the balance of justice/balance of convenience, it would be better to maintain the caveat (*Eng Mee Yong & Ors*; I *Luggage Distributors (M) Sdn Berhad v. Tan Hor Teng & Anor*).

(2) The registered owner of the land was the chargor company and not the first defendant. The first defendant's caveat was entered in his own name as a shareholder of the chargor company for the express purpose of protecting his personal interest. Only registrable interests in land are capable of being protected by entry of private caveats. The Court of Appeal in *Luggage Distributors* supported the principle that a shareholder of a proprietor company has no caveatable interests in the company's land (See also *Hew Sook Ying v. Hiw Tin Hee* and *Natsafe (M) Sdn Bhd v. Loi Teak Kuong*). It followed that the first defendant's application *vide* Form 19B did not show any caveatable interest at all since the registered owner of the land was the chargor company. Since the first defendant failed to satisfy the first-tier test, the caveat must be removed without the necessity of going any further.

(3) In respect of the registrar's caveat entered against the land the second defendant did not file any affidavit in reply to any of the plaintiff's affidavits. Therefore on the authority of *Ng Hee Thoong & Anor v. Public Bank Bhd*, the second defendant was deemed to have admitted all of the plaintiff's averments in the plaintiff's first and second affidavits which included the following: (a) that the indefeasible interest of the plaintiff as registered chargee took priority over any alleged interest protected by the registrar's caveat; and (b) that the registrar's caveat ought to be removed and cancelled.

Case(s) referred to:

Eng Mee Yong & Ors v. Letchumanan [1979] 1 LNS 18 PC ***(refd)***

Hew Sook Ying v. Hiw Tin Hee [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120 SC ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***

Natsafe (M) Sdn Bhd v. Loi Teak Kuong [2005] 2 CLJ 285 HC ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Berhad [1995] 1 CLJ 609 CA ***(refd)***

Legislation referred to:

Companies Act 1965, s. 226(3)

National Land Code, s. 323(1)

For the plaintiff - Tan Gian Chung; M/s Shook Lin & Bok

For the 1st defendant - HS Gill (Tejindarpal Kaur with him); M/s Tejindarpal & Co

Reported by Usha Thiagarajah

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JUDGMENT

Azahar Mohamed J:

[1] By this application in encl. 2 the plaintiff prayed, *inter alia*, for the following reliefs:

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(a) An order pursuant to Section 327 of the National Land Code 1965, that the Private Caveat registered *vide* Presentation No. 267/2002 lodged by the 1st defendant against the Land held under H.S. (D) No. 46317, P.T.D. No. 22712, Mukim Plentong, Daerah Johor Bahru, Negeri Johor Darul Takzim (the said land) be forthwith removed and that the land registrar do all that is necessary to ensure such removal within seven (7) days' written notice of the Order made herein;

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(b) An order that the 1st defendant and/or his nominees or agents be restrained from entering any further caveat on the said land held;

(c) An order pursuant to Section 321(3)(c) and Section 418 of the National Land Code 1965, that the 2nd defendant's decision in entering a Registrar's Caveat of Presentation No. 29280/2003 over the said land be set aside and that the Land Registrar do all that is necessary to ensure that the Registrar's caveat be forthwith removed within seven (7) days' written notice of the Order made herein;

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(d) Alternatively, a declaration that the interest of the plaintiff as a registered chargee of the aforesaid Land is indefeasible and takes priority over the alleged claim protected by the Registrar's caveat and a consequential order pursuant to Section 417 of the National Land Code 1965, that the Registrar's Caveat be removed and that the Land Registrar do all that is necessary to ensure such removal within seven (7) days' written notice of the Order made herein;

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(e) An order that the 1st defendant to forthwith pay damages to the plaintiff for losses incurred by the plaintiff as a result of the entry of the said Private Caveat, upon such damages having been assessed by the Court.

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[2] The 1st defendant was a director and shareholder of MDV Technical Services Sdn. Bhd (in liquidation), which is the registered proprietor of the said land. The 2nd defendant is the Pengarah Tanah dan Galian Johor.

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[3] The background facts, which resulted in the present application, are as follows. On 5 September 1992, the plaintiff granted RM13 million banking facilities comprising a term loan, an overdraft, a foreign bills purchase and an export credit refinancing facility to United Cannery Sdn. Bhd. (in liquidation) (the borrower). The banking facilities were partly secured by a third party charge over the land, by MDV Technical Services Sdn. Bhd. (the chargor). The borrower utilized the credit facilities. As it turned out, the borrower and chargor defaulted in repayment of the facilities. The plaintiff then took steps to recover the credit facilities including commencing foreclosure proceedings to realize its charge over the land. Subsequently, the chargor company was wound up on 23 March 1994 and pursuant to s. 226(3) of the Companies Act 1965, the plaintiff had on 18 July 1996 obtained leave from the court in Johore Bahru High Court No. 28-101-1993 to proceed with realisation of the charge. The plaintiff had, in exercising its rights as a registered chargee of the said land, on 10 December 1998 obtained an order for sale in respect of the said land from the court. However, the receiver and manager appointed over the borrower then negotiated with the official receiver for a sale of the said land, which would result in redemption of the plaintiff's charge. The 1st defendant had on 2 December 2002 lodged a private caveat lodged over the land and registered under presentation no. 267/2002 (the private caveat). On 20 February 2003 the plaintiff filed its notice of intention to continue with the foreclosure of the land. A registrar's caveat has been entered over the said land on 20 August 2003 and registered under presentation no. 29280/2003 (the registrar's caveat). On 22 June 2004, the plaintiff obtained order in terms of its summons for directions for a new auction date and a new reserve price for the sale of the land. On or about 10 September 2004, the 1st defendant filed an application for, *inter alia*, an injunction to restrain the plaintiff from disposing off the said land by auction. The grounds of the 1st defendant's application were, *inter alia*, that the said land was the subject matter of a civil suit before this court. The 1st defendant's application was however dismissed on 13 September 2004. In the interim, the plaintiff had relied on the expectation that the official receiver appointed over the chargor company would try to effect the sale of the said land and thereafter to redeem the charge. However, such sale did not materialize. The plaintiff then decided to proceed with a public

auction of the said land to enforce the order for sale. In this respect the plaintiff conducted, through its solicitors, a land search on the said land on 4 January 2006 and by that search it was discovered the existence of the private caveat and the registrar's caveat. That is why, on 1 March 2006 the plaintiff filed the present application.

[4] I shall now deal with the application for the removal of the private caveat. Given that the plaintiff is the registered chargee of the land, its registered title is *prima facie* evidence of its unfettered right under the charge to deal with the land. As a result, it is for the defendant to satisfy the court that there are sufficient grounds in fact and in law for the private caveat to remain. It is well settled that as a rule the test for the removal of private caveat is a 3-stage test:

1. the claim contained in the application made by the caveator in Form 19B under s. 323 of the National Land Code (the NLC) amounts in law to a caveatable interest;

2. if the above is answered in the affirmative, then the caveator must show that his claim to an interest in the land discloses a serious question meriting a trial; and

3. in the event that the caveator manages to cross the hurdle above, then he must show that on the balance of justice/ balance of convenience, it would be better to maintain the caveat.

(See: *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18 and *Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng & Anor* [1995] 3 CLJ 520.)

[5] Thus, the first stage is the examination of the grounds expressed in the application for caveat ie, Form 19B of the NLC. In the 1st defendant's application to enter private caveat (Form 19B) dated 20 December 2001, the 1st defendant stated that:

> (a) I am a share-holder of MDV Technical Service Sdn. Bhd. and make this application on my own behalf as a share-holder, having interest in this company which is the registered owner of this land.

(b) I intend to file an action on behalf of myself to ask the Court to determine on this issue and I am filing this Caveat to protect my interest.

[6] The important point to note here is that the registered owner of the land is the chargor company and not the 1st defendant. The 1st defendant's caveat was entered in his own name as a shareholder of the chargor company for the express purpose of protecting his personal interest. The question is: can the grounds stated in Form 19B therein under s. 323 of the NLC amounts in law to a caveatable interest? Now, s. 323 says:

(1) The persons and bodies at whose instance a private caveat may be entered are:

(a) any person or body claiming title to, or any registrable interest in, any alienated land or undivided share in any alienated land or any right to such title or interest;

(b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and

(c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b)

(2) Any such person or body wishing to apply for the entry of such a caveat shall do so in Form 19B and such application shall be attested in accordance with the provisions of section 211 and shall state therein the nature of the claim on which his application is based, and whether the caveat is to be expressed to bind the land itself or an undivided share in the land or a particular interest only.

(3) Any application under this section shall be accompanied by:

(a) the prescribed fee;

(b) the grounds giving rise to the claim thereto, verified by a statutory declaration by the applicant or his advocate and solicitor; and

(c) if relating to a part of the land a description or a plan of the land affected, and if relating to an undivided share in the land or a part thereof, a description, which is sufficient for identification.

A **[7]** The Court of Appeal in the *Luggage Distributor*'s case sets out what can be caveatable interests and held that only registrable interests in land are capable of being protected by entry of private caveats. Gopal Sri Ram JCA when delivering the judgment of the court laid down the following principles:

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> The parameters of caveatability under **s. 323(1)(a)** are therefore circumscribed by these words: "title" and "registrable interest". It is only one who makes a claim to either of these in land may enter a private caveat.

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> Although the words "title" and "registrable interest" are not defined by the Code, their meaning may be gathered from the scheme of the Code and from the indefeasibility provision, namely, **s. 340(1)**. The latter points to a bifurcation between title (the equivalent of the English fee simple) and registrable interests, that is, leases, charges and easements.

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> In my judgment, the position that obtains under the Code, so far as is relevant to the present appeal, may be stated in the following way. The Code creates three categories of interests in land. They are as follows.

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> **Category 1:** Registrable interests in land.
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> Only certain interests are capable of registration. Within this are two subcategories, namely:
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> (a) Registered title. This may be in perpetuity or for a term of years. It pertains to ownership of land. The "owner" is termed by the Code as a "registered proprietor",

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> (b) Registrable interests falling short of ownership. These are leases, charges and easements.

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> Registration carries with it a bundle of rights, which includes, subject to any restriction imposed by the alienating authority, the right to effect a transfer of the particular registered interest. The Code, in **s. 340(1)**, confers indefeasibility upon registered title and interests in land. **Section 340(2)** creates exceptions, which, if established, may operate to defeat such registered title or interest;

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> **Category 2:** Interests that are incapable of registration.
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> These include tenancies exempt from registration, which may be protected by means of an endorsement upon the register document of title;

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Category 3: Caveatable interests.

These are unregistered interests which are capable of protection by the entry of a private caveat. In the context of **s. 323(1)(a),** it is only a claim to the interests falling under category 1(a) and (b) above that may be protected by the entry of a private caveat. Cases falling under category (2) are not caveatable interests. A private caveat cannot, therefore, be entered by one who claims such an interest. Protection for such interests must be secured in the manner prescribed by the Code.

[8] The Court of Appeal has identified registrable interests as interests relating to ownership, leases, charges and easements. To my mind, *Luggage Distributor*'s case supports the principle that a shareholder of a proprietor company has no caveatable interests in the company's land. This principle was shown in two cases.

[9] Firstly, the decision of our Supreme Court in *Hew Sook Ying v. Hiw Tin Hee* [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120, where it was held that the caveat entered by the respondent under s. 323 of the NLC in his own name for the express purpose of protecting his personal interest which can only mean that he had done so as a shareholder or on behalf of all shareholders of the company. The court ruled that the caveat should be removed and damages to be assessed by the lower court. Mohamed Azmi SCJ in writing for the court had this to say at p. 124:

The application for removal in the present appeal is a bit unusual in that the applicant is not the registered proprietor, and the caveat to be removed is entered not in the name of the company as a registered proprietor but in the personal name of the respondent, a third party. The caveator is not the typical purchaser but on the contrary it is the purchaser who is applying for the removal of the caveat entered by the third party. In our opinion the real dispute is not between the appellant purchaser and the company as registered proprietor but is between the appellant and the respondent who as the managing director is unhappy with the sale transaction carried out by the directors. As a managing director, he feels he has a duty as a trustee to protect the interest of the shareholders against any misdeed of the directors.

The problem in this case is to identify the caveator's claim to title or registrable interest in the land under **s. 323(1)** NLC. What is his caveatable claim?

[10] Further down His Lordship added:

> The contemporaneous document in Form 19B does not support the respondent's assertion in his affidavit that the caveat is lodged by him as a managing director to protect the interest of the company, but is expressly for the purpose of protecting his own personal interest, possibly as a shareholder.

[11] And further down at p 125 His Lordship concluded:

> In entering the caveat in his own name for the purpose of protecting his own personal interest, it can only mean that he has done so as a shareholder or on behalf of all shareholders of the company.

[12] And, secondly the decision in *Natsafe (M) Sdn. Bhd. v. Loi Teak Kuong* [2005] 2 CLJ 285. There, the defendant was one of the shareholders in the plaintiff. There was a dispute amongst plaintiff's shareholders. Subsequent thereto, the shareholders entered into a settlement agreement, which terms, among others were: (1) two shareholders namely, Loi Tek Hua and Loi Tesk Ping were to purchase the shares of Wong Min Ngik and the defendant in the plaintiff; (ii) the purchase price to be settled, firstly, by way of distribution of the plaintiff's assets and secondly by way of cash. The plaintiff was in financial difficulties. In order to repay its debts, the plaintiff resolved to sell its property to another. The defendant entered a private caveat on the said property. The plaintiff applied to the court for the removal of the said caveat. The defendant claimed that he had a caveatable interest in the property on the grounds that: (i) he was the shareholder of the plaintiff; and (ii) the settlement agreement conferred him rights in the property. It was held that the defendant did not have a caveatable interest within the meaning of s. 323(1) of the National Land Code 1965. Form 19B as filed by the defendant did not vest in him, as a shareholder, any caveatable interest in the property. Addressing the judgment of the Supreme Court in *Hew Sook Ying v. Hiw Tin Hee*, Abdul Malek Ishak J (as he then was) said at pp 293 & 294:

> It is trite law that the plaintiff, a limited company incorporated under the Companies Act 1965, and its shareholders are two separate legal entities (*Hew Sook Ying v. Hiw Tin Hee* [1992] 3 CLJ 1325 *(supra)*). To reiterate, the property is registered in the name of the plaintiff and not the shareholders of the plaintiff. It must be recalled to mind that the Supreme Court in *Hew Sook*

> *Ying v. Hiw Tin Hee* [1992] 3 CLJ 1325 *(supra)* emphasised, in clear words, that in a case where the company was the registered proprietor of the land and had sold the land to the appellant and had handed to the appellant the instrument of transfer and the document of title for registration, it was impossible to envisage how the respondent there as the managing director either personally or as a shareholder or as an officer of the company, could be said to have a caveatable claim to title or registrable interest under s. 323(1) of the NLC. Likewise here, as a shareholder of the plaintiff, the defendant has no caveatable interest, at all, in the property. Even the settlement agreement does not confer any caveatable interest in the defendant. The plaintiff is not a party to the settlement agreement. The parties involved in the settlement agreement are the shareholders of the plaintiff. That being the case, the defendant cannot enforce the settlement agreement against the plaintiff. It is for this very reason that the settlement agreement does not confer any caveatable interest to the defendant.

[13] Returning to our present case and applying the foregoing principles to the facts of the case before me, the 1st defendant's application *vide* Form 19B does not show any caveatable interest at all as the registered owner of the land is the chargor company. Since the 1st defendant fails to satisfy the 1st tier test, the caveat must be removed without the necessity of going any further. In my judgment, the grounds stated by the 1st defendant in Form 19B therein are inadequate in law to support a private caveat. As Gopal Sri Ram JCA said in *Luggage Distributor*'s case at p. 728 of the report:

> In my judgment, there are three stages through which an inquiry of this nature must go. The first stage is the examination of the grounds expressed in the application for the caveat. If it appears that the grounds stated therein are insufficient in law to support a caveat, then *cadit quaestio,* and the caveat must be removed without the necessity of going any further.

[14] Now I come to a different point. It concerns the registrar's caveat, which had been entered over the said land on 20 August 2003. In this regard, the 2nd defendant has not filed any affidavit in reply to any of the plaintiff's affidavits. Thus, on the authority of *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609, the 2nd defendant is deemed to have admitted all of the plaintiff's averments in the plaintiff's 1st and 2nd affidavits including the following:

A a) that the indefeasible interest of the plaintiff as registered chargee takes priority over any alleged interest protected by the Registrar's Caveat; and

b) the Registrar's Caveat ought to be removed and cancelled.

B **[15]** Therefore, based on all the aforesaid reasons and having regard to the facts of this case, I made an order in terms of encl. 2 with costs to the plaintiff's.

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